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IN THE SUPREME COURT OF THE UNITED STATES

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WENDY SMITH, ET AL., )

Petitioners, )

v. ) No. 22-1218

KEITH SPIZZIRRI, ET AL., )

Respondents. )

- - - - -

Washington, D.C.

Monday, April 22, 2024

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 12:32 p.m.

APPEARANCES:

DANIEL L. GEYSER, ESQUIRE, Dallas, Texas; on behalf of the Petitioners.

E. JOSHUA ROSENKRANZ, ESQUIRE, New York, New York; on behalf of the Respondents.

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P R O C E E D I N G S

(12:32 p.m.)

CHIEF JUSTICE ROBERTS: We'll hear argument next in Case 22-1218, Smith versus Spizzirri.

Mr. Geysler.

ORAL ARGUMENT OF DANIEL L. GEYSER

ON BEHALF OF THE PETITIONERS

MR. GEYSER: Thank you, Mr. Chief Justice, and may it please the Court:

Section 3 unambiguously mandates a stay pending arbitration, and the FAA's plain text, structure, and purpose confirm that conclusion. Congress directed that a court shall stay the trial of the action until the arbitration is complete. There is no mention of dismissal, and there are no exceptions for cases where all claims are subject to arbitration.

If a court ignores that command and dismisses, it activates a premature right to appeal, contrary to the FAA's reticulated scheme. It illuminates the essential backdrop that protects litigant rights if a party compels arbitration but abandons the arbitration process, which has happened in this very case.

1 And, critically, it invites wasteful disputes  
2 that pointlessly burden parties and courts as  
3 litigants fight over whether to stay or dismiss  
4 and then take appeals over whether to stay or  
5 dismiss.

6 A bright-line rule answers that  
7 procedural question in a manner that best  
8 preserves judicial and party resources and  
9 directly advances the core purpose of the FAA  
10 itself, eliminating waste, avoiding unnecessary  
11 litigation, and sending parties to arbitration  
12 as quickly as possible.

13 I welcome the Court's questions.

14 JUSTICE THOMAS: Mr. Geyser, what  
15 difference does it make to grant a stay here or  
16 dismissal without prejudice?

17 MR. GEYSER: Well, it -- it makes a  
18 big difference whether we have a seat to come  
19 back to. The arbitration has now failed. The  
20 Respondents have not paid their fees. Our --  
21 our clients will have to file new suits, engage  
22 in new service, do new case-initiating  
23 documents, and waste our time and the court's  
24 time.

25 We also face a situation where

1 Respondents could then move to compel  
2 arbitration again and further --

3 JUSTICE THOMAS: But aren't you also  
4 encouraging people to start out in federal  
5 court?

6 MR. GEYSER: I don't believe so, Your  
7 Honor. That hasn't been a problem in any of the  
8 six circuits that have adopted the majority rule  
9 now for quite some time. Even if a party did  
10 file a suit in the hopes of anchoring federal  
11 jurisdiction, the court could always decline to  
12 exercise supplemental jurisdiction and not  
13 decide any of the FAA motions, which would  
14 render the entire practice a waste of time.

15 JUSTICE THOMAS: Has there been a  
16 problem of, when cases have been dismissed  
17 without prejudice, to get back into federal  
18 court?

19 MR. GEYSER: There are sometimes  
20 limitations problems, which you can see both in  
21 the Green decision from the Eighth Circuit and  
22 Anderson in the Sixth Circuit.

23 But I -- I think the more important  
24 point is not even the cases that can't come  
25 back; it's the very waste of time and resources

1 litigating whether to stay or dismiss when it's  
2 such a one-sided bargain.

3 This -- there are over 800 contested  
4 arbitration matters every single year. There --  
5 there's very little upside to saying, in every  
6 one of those cases, whenever anyone disagrees  
7 about whether to stay or dismiss, the parties  
8 should brief that question, the court should  
9 waste its resources deciding it, the losing  
10 party could take an appeal, instead of just  
11 saying, as a categorical matter, let's follow  
12 what the statute actually says.

13 JUSTICE JACKSON: Well, you talk about  
14 what the statute actually says. It says stay  
15 the trial. And Respondent makes a lot of that.  
16 So what is your response to that argument?

17 MR. GEYSER: I think we have a few  
18 responses. The first is this is the trial that  
19 would happen if there isn't an arbitration. So  
20 it's staying the trial of the action. This is  
21 trying the case, staying the merits  
22 adjudication, so that the parties can effectuate  
23 the arbitration agreement.

24 The other thing I would say is that  
25 when my -- my friend suggests that there won't

1 be a trial because the case is subject to  
2 arbitration, that's inherently speculative.  
3 There are lots of examples where a court compels  
4 arbitration and the parties return to court  
5 either because there's a delegation clause and  
6 it turns out the whole dispute isn't subject to  
7 arbitration, you can have the plaintiff not  
8 initiating the arbitration, you can have the  
9 defendant not paying the arbitration fees, which  
10 is what happened --

11 JUSTICE JACKSON: But you would -- you  
12 would have an easier case if it said stay the  
13 proceeding or stay the action. I mean, the --  
14 the statute is using the word "trial." You want  
15 us to interpret it to be proceeding or action,  
16 but that's not exactly what it says.

17 MR. GEYSER: Well, for -- for what  
18 it's worth, the -- the title, which is actually  
19 a part of what Congress inserted into the United  
20 States Code in 1947, does say "stay of  
21 proceedings." So Congress has always understood  
22 this to be staying the proceedings, the merits  
23 adjudication.

24 Now I think the FAA, which is not  
25 known for being the world's most precisely



1 drafted statute -- I think still, though,  
2 Congress here could have used that language for  
3 a particular reason. If you stay the entire  
4 case, it's not clear the court would have  
5 jurisdiction because, remember, it's staying the  
6 case until the arbitration is over. It's not  
7 clear the court would have jurisdiction to  
8 entertain motions under the FAA that would  
9 facilitate the arbitration.

10 So let's say the parties have trouble  
11 appointing an arbitrator. Could the court then  
12 lift the stay to decide that motion? It's not  
13 clear. But, if Congress is simply saying stay  
14 the trial of the action, that's staying trying  
15 the action, staying the merits adjudication.  
16 That leaves the courts, you know, available to  
17 decide these other motions under the Federal  
18 Arbitration Act.

19 And just --

20 JUSTICE SOTOMAYOR: Would a district  
21 court -- under *Badgerow*, could it dismiss rather  
22 than stay a federal action or a motion to -- to  
23 compel if it properly concludes that it does not  
24 have subject matter jurisdiction over the case,  
25 non-diverse parties and only involves state law

1 issues?

2 In that situation, if the arbitration  
3 fails, you have to go sue in state court,  
4 correct? You can't stay in federal court  
5 anyway?

6 MR. GEYSER: I -- I just -- I want to  
7 make sure that I'm answering the -- the question  
8 correctly --

9 JUSTICE SOTOMAYOR: Mm-hmm.

10 MR. GEYSER: -- so please -- please  
11 correct me if I'm not. You're dealing here with  
12 a situation under Section 3. So there's already  
13 a preexisting suit in federal court where there  
14 is federal jurisdiction.

15 Now, if a court concludes that there  
16 never should be any case in federal court, the  
17 underlying case on the merits is a state law  
18 dispute between non-diverse parties, the court  
19 would dismiss. It wouldn't compel arbitration.  
20 It has no jurisdiction to do anything.

21 JUSTICE SOTOMAYOR: Okay.

22 MR. GEYSER: But -- but, if the court  
23 has jurisdiction at the outset, then Section 3  
24 says this is the proper remedy for enforcing the  
25 parties' arbitration agreement. Do the stay.

1 Once arbitration has been had in accordance with  
2 the agreement, then the court would have the  
3 option to exercise supplemental jurisdiction and  
4 decide the case going forward under the -- the  
5 post-arbitration motions, or it could dismiss  
6 and say go to state court, enforce, you know,  
7 the -- the arbitration award in some other  
8 venue.

9 JUSTICE SOTOMAYOR: Thank you.

10 MR. GEYSER: I -- I think just -- you  
11 know, I -- I hate to belabor it. My -- my  
12 friends just -- I think one of their stronger  
13 arguments is they try to suggest that there's  
14 inherent authority for a court to decide what to  
15 do when you have an arbitration agreement. I  
16 think that fails for multiple reasons.

17 It first fails in its premise because  
18 there is no inherent authority of the kind that  
19 this Court has recognized as being the sort of  
20 timeless power that courts have in order to  
21 function as courts. This is effectively a  
22 substantive rule of decision. It's saying this  
23 is the procedure that a court should apply in  
24 deciding how to process an arbitration motion  
25 and enforce it in court. Even if there were

1 some inherent authority, it's obviously been  
2 overridden by what we consider to be the fairly  
3 unambiguous language of the statute.

4 Just one last point to Justice  
5 Jackson's question at the outset, my friends did  
6 suggest in their brief in opposition that  
7 "trial" really just meant trial, as in like the  
8 fact-finding event. It didn't state anything  
9 else. That, of course, is absolutely  
10 incompatible with the entire purpose of the  
11 Federal Arbitration Act.

12 That would say that courts could  
13 actually entertain motions to dismiss, summary  
14 judgment motions. You could have court-based  
15 discovery. You could have everything as long as  
16 the court at the very last minute stops before  
17 empaneling a jury. We don't think that's a  
18 plausible reading of the act.

19 JUSTICE GORSUCH: Mr. Geysler --

20 CHIEF JUSTICE ROBERTS: Well --

21 JUSTICE GORSUCH: -- I -- I -- I got  
22 one -- oh.

23 CHIEF JUSTICE ROBERTS: Go ahead.

24 JUSTICE GORSUCH: I got one for you on  
25 the inherent power point, and I -- I take your

1 point about the trial. I mean, I don't -- I  
2 never filed a complaint where I didn't want a  
3 trial. And that was the whole reason why I  
4 filed the complaint.

5 But, on the inherent power, what about  
6 the district court's authority to dismiss a case  
7 for abusive litigation tactics, for example?  
8 Does this prevent that?

9 MR. GEYSER: Absolutely not. So all  
10 Section 3 does is say, if the operative fact is  
11 I found that any issue in the case is subject to  
12 arbitration, what do I do? That doesn't  
13 preclude the court's ability to access any other  
14 source of federal law that would let it do  
15 anything else in the case.

16 JUSTICE GORSUCH: Very good. Thank  
17 you.

18 CHIEF JUSTICE ROBERTS: Your friend  
19 makes the point that the Arbitration Act is  
20 designed to prevent wasteful litigation among --  
21 among other things. Why isn't it wasteful to  
22 maintain the case on the court docket if, for  
23 example, all -- all claims are subject to  
24 arbitration?

25 MR. GEYSER: I -- I don't think it's

1 wasteful for multiple reasons, including, first  
2 and foremost, it's -- it's very little waste at  
3 all. It's just an inactive case. The court can  
4 have a status report. It can be a sentence  
5 long. The case is still pending in arbitration,  
6 the stay should remain in effect.

7           It's -- it's hard to imagine how --  
8 what kind of burden that would impose. And it  
9 saves waste in multiple ways. The first is that  
10 if the arbitration does fail, then the parties  
11 are coming back to the same court filing a new  
12 complaint. They're doing new service, new  
13 case-initiating documents, they're spending a  
14 lot more of the court's time.

15           It also would invite the court again,  
16 as I said at the outset, to decide in each case,  
17 on a case-by-case basis, should I stay or  
18 dismiss. That is an enormous and wasteful use  
19 of the court's time that will overwhelm whatever  
20 minor savings a district court might have in not  
21 having to read a status report every so often.

22           And the final point I'd raise is that  
23 it would also avoid the premature appeals. If  
24 you dismiss, if a court dismisses, that  
25 activates unintended finality. At that point,

1 the case is final. The party has a right to  
2 take an appeal. They can charge -- challenge  
3 the arbitrability determination.

4 That's inconsistent with what Congress  
5 wrote specifically in Section 16, and it would  
6 invite and breed even more litigation, as this  
7 Court in Bissonnette just reminded that we  
8 shouldn't be doing, while parties are stuck  
9 litigating arbitrability on appeal at the same  
10 time they're trying to arbitrate the merits in  
11 arbitration.

12 JUSTICE KAGAN: So what do most courts  
13 do when they have a case like this where, you  
14 know, they don't want to do anything, but there  
15 it is, still has to be on my docket?

16 MR. GEYSER: Most courts, they -- they  
17 do one of two things. They either have a  
18 requirement for intermittent status reports,  
19 sometimes it's every three months, sometimes  
20 it's every six months, just saying just let us  
21 know when you're done.

22 Other courts will move it to inactive  
23 status. So it's still pending on the court's  
24 docket, there's still a stay, but then they  
25 don't even have to worry about it at all. They

1 just leave it to the -- the parties to let them  
2 know once they're finished with the arbitration.

3 JUSTICE KAGAN: What's the worst thing  
4 that could happen from this?

5 MR. GEYSER: The -- well, the worst  
6 thing that would happen, I think, would be the  
7 court affirming, but -- but the --

8 (Laughter.)

9 MR. GEYSER: -- but the -- the -- the  
10 second worst thing would be I think, if this  
11 were a national rule, it's just -- it's going to  
12 consume an unbelievable amount of time and  
13 resources. And what it means is, as we've seen  
14 in the four circuits, I mean, if you look at the  
15 dozens and dozens and dozens of reported  
16 district court decisions with parties fighting,  
17 should we stay or should we dismiss, where the  
18 upside of a dismissal is there's an immediate  
19 appeal that shouldn't happen yet, and the  
20 court -- and the court is inviting potential  
21 problems in the future, when parties come back  
22 and it turns out the arbitration fails for any  
23 number of reasons, and then they're litigating  
24 potentially limitations questions, possible  
25 tolling issues.



1           It -- it just creates an enormous  
2 problem out of a statute that's designed to  
3 eliminate problems. A simple stay, it's  
4 categorical, it's simple. Go to arbitrate. Let  
5 us know when you're done. In the meantime, it's  
6 imposing effectively no burden on anyone.

7           JUSTICE SOTOMAYOR: Counsel --

8           JUSTICE ALITO: What would your  
9 argument -- what would your argument look like  
10 if there were no Section 16? So neither party  
11 had the right to an interlocutory appeal.

12           MR. GEYSER: I think we'd have one  
13 fewer arrow in our quiver, but I think our  
14 argument would otherwise be identical. I think  
15 Section 16 makes it -- our -- our job a lot  
16 easier because this Court does read sections in  
17 context.

18           And when you have Section 16 and  
19 Congress saying specifically, you can take that  
20 immediate appeal if the court denies arbitration  
21 but not if they grant arbitration and subject to  
22 1292(b), so Congress was even thinking there  
23 could be exceptions, but if you dismiss, then  
24 you have an immediate appeal because the case is  
25 final.

1           It's -- there's no second gateway with  
2           an appellate court deciding to accept a 1292(b)  
3           appeal. You don't have to meet any of those  
4           conditions. So I think it's really hard to  
5           understand how dismissal is consistent with  
6           Section 16. But, even without that, we have our  
7           plain text reading and we have all the other  
8           points that we've suggested are in our favor.

9           JUSTICE JACKSON: Counsel, what you've  
10          said that one of the reasons why stay is  
11          preferable to dismiss is that the court could  
12          then sort of continue to help out with certain  
13          administrative matters operating in the  
14          background when the arbitration is happening,  
15          like the appointment of an arbitrator under  
16          Section 5 or compelling witnesses under Section  
17          7.

18          As I read the Respondents' response,  
19          they point to Badgerow and say that, well, there  
20          might need to be an independent jurisdictional  
21          basis for the court to continue to operate in  
22          that fashion. Is that how you read Badgerow  
23          with respect to those kinds of tasks?

24          MR. GEYSER: Not at all. Badgerow  
25          involved a case where there -- there was no

1 litigation in federal court. There was an  
2 arbitration and then there was a freestanding  
3 lawsuit filed simply to confirm or to vacate the  
4 arbitration award.

5 In this case, there is preexisting  
6 jurisdiction. You don't -- you don't need more  
7 jurisdiction or extra jurisdiction. Once a  
8 court has power to decide the case, they can  
9 decide the case.

10 And at that point, as this Court said  
11 in Cortez Byrd, once there is a suit and it's  
12 been stayed under Section 3, the Court then has  
13 the power on the back end.

14 Now, granted, it's -- it's in the  
15 court's discretion, it's supplemental  
16 jurisdiction at that point to decide whether to  
17 engage in any of those other motions, but we  
18 don't see any inconsistency with Badgerow and,  
19 in fact --

20 JUSTICE JACKSON: What about  
21 confirmation? Is that the same kind of thing?  
22 Would you think that the parties in a case like  
23 this, if it were stayed, could come back to this  
24 same court to seek confirmation of the -- any  
25 award that was issued?

1           MR. GEYSER: They -- they absolutely  
2 could. And that's what Cortez Byrd  
3 contemplates. Now, again, though, it's in the  
4 court's discretion, we admit. The court could  
5 say no.

6           JUSTICE JACKSON: Right.

7           MR. GEYSER: I'm done with the case,  
8 go -- go have it confirmed somewhere else. And  
9 -- and if the court did that and it was -- it  
10 was a proper exercise of the court's discretion,  
11 then the -- we'd be out of luck. We'd have to  
12 go somewhere else to confirm the award, which is  
13 also, by the way, why this is very different  
14 than Section 8.

15           Section 8, aside from dealing only  
16 with, maritime cases, is a specific instruction  
17 to retain jurisdiction all the way to the entry  
18 of the decree. So Congress is addressing a very  
19 different problem in a different way.

20           JUSTICE ALITO: Suppose that on a  
21 Monday a district court grants a motion to  
22 compel and sends the entire dispute to  
23 arbitration and then the parties don't  
24 immediately ask for a stay, so on Tuesday  
25 morning, bright and early, the district court

1 wants to clear up the docket, dismisses the  
2 case.

3 What would happen there?

4 MR. GEYSER: I -- I -- I think that  
5 the parties realistically -- in reality would  
6 come back and say, actually, we would like a  
7 stay. It's a -- it's a little too early to  
8 dismiss.

9 I -- if the -- if the party hasn't  
10 requested a stay, which is why what we did here  
11 I think is the best practice, when the other  
12 side says we move to compel, in the answer to  
13 the motion to compel, if you want a stay, you  
14 should say and we would like a stay. That way,  
15 you avoid that scenario.

16 But -- but, technically, if the court  
17 has acted and the party hasn't requested a stay,  
18 then, on its face, Section 3 hasn't yet applied  
19 because it only applies if a party applies for a  
20 stay.

21 CHIEF JUSTICE ROBERTS: Thank you,  
22 counsel.

23 Anything further?

24 Anything further?

25 Thank you.

1 Mr. Rosenkranz.

2 ORAL ARGUMENT OF E. JOSHUA ROSENKRANZ

3 ON BEHALF OF THE RESPONDENTS

4 MR. ROSENKRANZ: Thank you, Mr. Chief  
5 Justice, and may it please the Court:

6 When Congress directed courts to stay  
7 the trial of a case in deference to arbitration,  
8 it meant stop the litigation in court. It did  
9 not mean you must retain jurisdiction. It did  
10 not mean never dismiss, no matter how clear it  
11 is that the case will never come back to court.

12 I get that modern lawyers often think  
13 of stays and dismissals as two completely  
14 distinct animals, but when Congress passed  
15 Section 3 a hundred years ago, Congress would  
16 not have drawn that stark a distinction. The  
17 drafters would have understood that a dismissal  
18 was one way to stay a litigation.

19 When Congress intended that a court  
20 retain jurisdiction, it used those words in  
21 Section 8. Even if that is not the best  
22 understanding, this Court should accept it as  
23 long as it's plausible. Courts generally have  
24 the discretion to dismiss cases without  
25 prejudice when no one is asking them to do

1 anything here and now and when another forum is  
2 actively adjudicating the case.

3 If Congress wants to revoke that  
4 inherent power, it's got to do it clearly, and  
5 as Mr. Geyser said, Congress did nothing clearly  
6 in this statute. Congress did not issue such a  
7 clear direction. Congress does not even mention  
8 requiring ongoing jurisdiction. It does not  
9 even prohibit dismissing.

10 Congress passed Section 3 to enforce  
11 contractual obligations to arbitrate and to  
12 avoid parallel litigation in court, not to  
13 encourage parallel litigation and reward  
14 plaintiffs who violate their contracts by suing  
15 in court.

16 I welcome the Court's questions.

17 JUSTICE THOMAS: Can you give another  
18 example of this continuing discretion when you  
19 have language similar to Section 3 that gives  
20 the part -- that makes it clear that a stay is  
21 to be granted?

22 MR. ROSENKRANZ: Well, Your Honor, let  
23 me -- I -- I quibble with the second half, that  
24 it makes it clear that a stay is to be granted.  
25 But, yes, I can give you --

1 JUSTICE THOMAS: So what's unclear  
2 about it?

3 MR. ROSENKRANZ: Well, so when  
4 Congress used the word "stay" back in 1925, it  
5 meant that it was requiring courts to stop the  
6 litigation, and it understood that courts could  
7 achieve it by either retaining jurisdiction over  
8 the case and putting it on ice or by dismissing  
9 it with -- without prejudice to come back if  
10 there's ever something for the court to do.

11 In 1925, the word "stay" was just not  
12 categorically inconsistent with a dismissal.  
13 The lead definition of "stay" in Black's Law  
14 Dictionary at the time was "stopping." The act  
15 of arresting what? Arresting a judicial  
16 proceeding. Another said that a stay of the  
17 action could include a total discontinuance.

18 JUSTICE SOTOMAYOR: Counselor, putting  
19 aside that the title says "stay of proceedings"  
20 and Black's Law Dictionary makes clear that  
21 that's different from dismissal -- I'm going to  
22 put that aside.

23 Can't put aside the language which  
24 says "stay until such arbitration has been had  
25 in accordance with the terms of the agreement,"



1 and so it's putting a limit. And it also says  
2 "providing that the applicant for the stay is  
3 not in default in proceeding when such" -- when  
4 the application is made, the district court  
5 can't tell how long it's going to be, can't tell  
6 whether a party is going to go in default.

7 It -- it -- I -- I can't read  
8 dismissal into those two conditions. If they  
9 were going to permit dismissal, they would have  
10 put "stay the action," period.

11 MR. ROSENKRANZ: Understood, Your  
12 Honor.

13 JUSTICE SOTOMAYOR: You can reopen the  
14 action or you can sue again if you don't have  
15 the arbitration concluded or if the other party  
16 defaults or something. But that's not how they  
17 wrote it.

18 MR. ROSENKRANZ: I understand, Your  
19 Honor. Let me just -- I -- I need to quibble  
20 with the -- with your first premise about  
21 Black's Law Dictionary. It supports us, not the  
22 other side. The very first definition is about  
23 -- about stalling the proceeding. It's about  
24 stopping.

25 But I'll answer the question about the

1 -- both the durational limitation and the  
2 proviso. They're two separate pieces.

3 "Until" simply means how long the  
4 litigation has to stop. If the court has  
5 dismissed without prejudice, the durational  
6 language dictates when the case can return to  
7 court. The durational language was also  
8 necessary to establish that any non-arbitrable  
9 claims which cannot be dismissed may be  
10 litigated in court when the arbitration is over.

11 But Section 3 is not a command to the  
12 court to retain jurisdiction for the duration of  
13 the arbitration. It does not say you must  
14 retain jurisdiction.

15 When Congress wanted courts to retain  
16 jurisdiction, as it did in Section 8, it said  
17 "retain jurisdiction," and it would not have  
18 needed to say "retain jurisdiction" in Section 8  
19 if Section 3 already required the court to  
20 retain jurisdiction.

21 As to the proviso that a stay  
22 applicant not be in default, that makes perfect  
23 sense on our reading also. If a plaintiff  
24 starts by filing an arbitration proceeding,  
25 that's the first thing, the defendant then

1 refuses to arbitrate, the plaintiff can then  
2 file in court under Section 4.

3 The proviso says when the defendant  
4 says, hold on, wait a minute, you need to  
5 arbitrate, the proviso says, no, the defendant  
6 cannot force an arbitration because the  
7 defendant is in fault.

8 Similarly, if the plaintiff begins in  
9 court and then the court dismisses without  
10 prejudice and the defendant then defaults, the  
11 proviso says that the plaintiff has a free pass  
12 for the --

13 JUSTICE SOTOMAYOR: Okay. Thank you.

14 CHIEF JUSTICE ROBERTS: Have there  
15 been any problems in the six -- six circuits  
16 that have filed -- followed your friend's rule?

17 MR. ROSENKRANZ: So -- so, yes, Your  
18 Honor. The -- the problems in those circuits is  
19 that the courts are required to keep these cases  
20 on their dockets. And when you look at the  
21 differential costs to the district courts itself  
22 as opposed to -- to the parties, this is -- if  
23 you nationalize this, this is death by tens of  
24 thousands of cuts.

25 You can imagine the practice articles

1 that are going to emerge after this Court issues  
2 its opinion if it's in favor of the Petitioners.  
3 They will say exactly what Justice Thomas said  
4 in his very first question. Never ever file an  
5 arbitration first. Start in court, preferably  
6 in federal court because, when you're there, the  
7 court will be a helicopter parent for as long as  
8 you want it. Don't worry if there's zero basis  
9 for you to even resist arbitration.

10 JUSTICE KAGAN: Well, but what's the  
11 biggest --

12 CHIEF JUSTICE ROBERTS: Well, I guess  
13 -- I -- I was just going to say, well, I guess  
14 the flip side of that is it's a much greater  
15 burden if the case isn't there and something  
16 arises where you need to go to court. You're  
17 going to have to start all over.

18 MR. ROSENKRANZ: So, Your Honor, two  
19 -- two observations about that. First is the  
20 burden on the district court in just having the  
21 case sitting there. There are a hundred  
22 thousand arbitrations a year. Mr. Geyser refers  
23 to only 800 of them that ever come back to court  
24 because they are contested.

25 Once all of these stays are sitting in

1 court, the court has to manage them. It has to  
2 report on them. It has to hold status  
3 conferences, possibly for years. And think  
4 about it from the perspective of these district  
5 courts. I know it's easy to say what's the big  
6 deal, just hold a status conference. But there  
7 are courts that are in dire circumstances. They  
8 are overwhelmed. They are in emergency --

9 JUSTICE JACKSON: Is there a rule that  
10 the district court has to hold a status  
11 conference? I was not aware of that.

12 MR. ROSENKRANZ: No, there's not a  
13 rule that a district court has to do that.

14 JUSTICE JACKSON: So they could just  
15 ask for a one-line report?

16 MR. ROSENKRANZ: The court does not  
17 have to hold in-person status conferences.  
18 That's -- that is correct. But simply having to  
19 keep track of all of these cases, in some  
20 federal courts, there's no such thing as  
21 administrative closure. The court is constantly  
22 documenting and asking: Wait a minute, is this  
23 case still alive? And --

24 CHIEF JUSTICE ROBERTS: Well, I may --  
25 I -- I -- I may not be familiar with the

1 practice, but why can't you just -- constantly  
2 monitoring it, why don't you tell the parties,  
3 if you need to get back or when something  
4 happens in the arbitration, let us know?

5 MR. ROSENKRANZ: Well, Your Honor, the  
6 -- it is the responsibility of the district  
7 court to know what's on its docket --

8 CHIEF JUSTICE ROBERTS: Yeah, well --

9 MR. ROSENKRANZ: -- and not to keep  
10 cases on the docket that are not active. It --  
11 it's -- it -- it's not supposed to be keeping  
12 cases that, for example, have settled and no  
13 one's told the court or where the parties go to  
14 a different court for confirmation, which is  
15 perfectly --

16 JUSTICE KAGAN: But, presumably, Mr.  
17 Rosenkranz, a district court will just keep a  
18 list of cases now in arbitration, and that list  
19 will exist in some file someplace, and nobody  
20 will do anything with it, except if there's a  
21 problem.

22 MR. ROSENKRANZ: Well, the -- this  
23 court still has to keep a list. That is still  
24 work, and it is more work than is necessary  
25 because, when you think about the flip side, to

1 answer the second half of the Chief Justice's  
2 question, the flip side is, okay, so a party has  
3 to -- if it ever needs further judicial  
4 intervention, the party has to file a new  
5 action.

6           It's a streamlined process. It almost  
7 never happens. Courts almost never need to  
8 intervene to appoint an arbitrator or to compel  
9 a witness. Mr. Geyser points out a very -- very  
10 tiny proportion of these arbitrations are even  
11 ever contested, and they may not even be  
12 contested in the same court. So it is needless  
13 activity.

14           JUSTICE JACKSON: But don't parties  
15 often seek confirmation of arbitration awards?

16           MR. ROSENKRANZ: No, Your Honor. It's  
17 very rare. If the -- if the party on the other  
18 side is going to pay the judgment, for example,  
19 or if the defendant has won, no one really seeks  
20 confirmation --

21           JUSTICE JACKSON: Well, sure. If the  
22 defendant has won, but let's say we have a  
23 situation in which a plaintiff who originally  
24 brought this case in court because they thought  
25 it was the kind of thing that should be

1 litigated in court, lost the motion for  
2 arbitrability, so it's now sent off to an  
3 arbitrator, and then, miracle of miracles, they  
4 win on the arbitration.

5 My question is, isn't that a situation  
6 in which a plaintiff could at least come back to  
7 the district court if it had been stayed and ask  
8 for confirmation?

9 MR. ROSENKRANZ: Hypothetically could,  
10 yes. It's very rare, but --

11 JUSTICE JACKSON: But, if the case is  
12 dismissed, they would have to actually file a  
13 new action with the fee and everything else to  
14 open up that case to -- which they, by the way,  
15 thought should have been in court to begin with  
16 because, in -- in my hypothetical, that's where  
17 they brought it originally. Why isn't that more  
18 burdensome for the overall system than to just  
19 allow the district court to put this on a list  
20 somewhere and, if the plaintiff wins, be able to  
21 entertain a motion for confirmation?

22 MR. ROSENKRANZ: Well, so two -- two  
23 answers, Your Honor.

24 The first is, as I was saying earlier,  
25 yes, hypothetically, the plaintiff in that



1 situation could seek confirmation. It is very  
2 rare because defendants almost never challenge  
3 the judgment in the first place. So no one ever  
4 seeks confirmation. The case is sitting there  
5 without any need ever to come back to the  
6 district court.

7 The second answer is filing a new  
8 action, it sounds like it's such a big deal, but  
9 there's a streamlined process. It is not that  
10 much of a burden.

11 JUSTICE JACKSON: You have to pay,  
12 don't you? I mean, you'd have to file a new  
13 action. With -- like, we paid -- the plaintiff  
14 says, I paid on day one because I brought this  
15 in court and it was whatever the filing fee is.  
16 My case got shunted to arbitration. I win. And  
17 now you're saying I have to pay another \$500  
18 to --

19 MR. ROSENKRANZ: Sure, sure. And then  
20 the flip side is there is a tax on the parties  
21 who are sitting in -- in arbitration and also  
22 have to report to the district court.

23 What the court would basically be  
24 saying to those parties is sure, you have a  
25 right to arbitration, but you've got to report

1 to the district court. Sometimes you have to  
2 negotiate with the other side on what that  
3 report contains.

4 You've got to quibble over who's in  
5 default and -- and why this is taking so long.  
6 And so that's hundreds of dollars of taxes on  
7 both parties for a case that doesn't need to sit  
8 in --

9 JUSTICE KAGAN: Mightn't --

10 CHIEF JUSTICE ROBERTS: Well,  
11 you're -- I'm sorry. It's your -- it's your  
12 turn.

13 JUSTICE KAGAN: No, go ahead.

14 CHIEF JUSTICE ROBERTS: You're saying  
15 that it's more trouble to let the thing just sit  
16 there than to file a new action, right? I mean,  
17 you're saying: Well, even if it -- it -- you  
18 know, if it's just a stay, you know, it's just  
19 sitting there, but they've got to keep track of  
20 it and whatever and saying the alternative is,  
21 file a new lawsuit. It seems to me that the  
22 alternative would be a lot more burdensome than  
23 just --

24 MR. ROSENKRANZ: And -- and --

25 CHIEF JUSTICE ROBERTS: -- sitting

1       there.

2                   MR. ROSENKRANZ:  -- it -- it could be,  
3       but it may not necessarily be if there are  
4       constant and -- and repeated reports, but we're  
5       -- we're not basing our argument on costs.  
6       We're basing -- we're basing our argument on the  
7       language of the statute.

8                   And -- and a century ago, lawyers --

9                   JUSTICE KAGAN:  And just -- just  
10       before you get back to the language, I mean,  
11       mightn't the statute of limitations have run if  
12       you have to file a new action, but the statute  
13       of limitations has run in the meantime?  There's  
14       no tolling of the statute of limitations in the  
15       circumstance that you're talking about, is  
16       there?

17                   MR. ROSENKRANZ:  There can be in some  
18       jurisdictions, but there's an easy solution to  
19       that.  If a party wants to oppose a stay on the  
20       ground that there is a statute of limitations  
21       problem, they just raise that as a basis for the  
22       district court to deny dismissal, and -- and the  
23       district court can consider that or it can  
24       condition dismissal.

25                   JUSTICE KAGAN:  Well, that's just

1 beginning to sound very complicated. It's like  
2 sometimes I should dismiss; sometimes I  
3 shouldn't dismiss. I have to go figure out what  
4 the statute of limitations consequences are.

5 MR. ROSENKRANZ: Your Honor, look at  
6 -- look at the papers before the district court  
7 on this case when the parties were fighting  
8 about or arguing about stay versus dismissal.  
9 It was three paragraphs in their response brief  
10 in response to our motion to dismiss and two  
11 paragraphs in our response brief.

12 I -- I'll give you the page numbers.  
13 It's 97 to 98 in their response brief and 103 to  
14 104. It's not that complicated.

15 But Petitioners are trying to cram a  
16 lot of meaning into the word "stay." They say  
17 it means stop the litigation and continue to  
18 exercise jurisdiction and don't dismiss,  
19 regardless of how unlikely it is that anyone is  
20 ever come -- going to come back to the -- to  
21 court.

22 The -- the word "stay" does not carry  
23 all of that meaning. When Congress wanted to  
24 communicate don't -- wanted to communicate that  
25 the court must retain jurisdiction, that's what

1 it said. That's -- it -- it said retain  
2 jurisdiction, which is what it said in Section  
3 8.

4 I would also underscore there's  
5 another reason to read the statute our way.  
6 Section 4, a plaintiff can bring an action in  
7 the first instance, as I was saying earlier,  
8 under Section 4, seeking an order directing the  
9 court to compel arbitration when the defendant  
10 has refused to engage in arbitration.

11 But Congress never said that the court  
12 has to retain jurisdiction in that circumstance.  
13 And the norm in that circumstance is that the  
14 district court dismisses after ordering  
15 arbitration because that's the only thing it's  
16 been asked to do.

17 Now, if it was so important for  
18 Congress to make sure that parties never appeal  
19 a -- a dismissal -- excuse me -- never appeal an  
20 order to arbitrate while the arbitration is  
21 going on, if it's so important to Congress that  
22 federal courts retain jurisdiction while an  
23 arbitration is going on, it would have applied  
24 the same rule to Section 4, but it didn't.

25 I was saying earlier that even if the

1 Court thinks that -- that Petitioners' reading  
2 is better, they cannot avoid the language of the  
3 statute or the ambiguity -- excuse me, they  
4 cannot avoid the result that we're arguing if  
5 the statute is ambiguity -- is -- is ambiguous.

6 Any doubt has to be resolved in favor  
7 of maintaining the district court's traditional  
8 discretion to dismiss cases when appropriate and  
9 preserving the backdrop -- the backdrop common  
10 law in which courts routinely dismissed in  
11 deference to arbitration.

12 When parties have nothing that they  
13 want the court to do here and now, a court has  
14 the power to dismiss, without prejudice, but to  
15 dismiss, in the interest of controlling its own  
16 docket and maximizing efficiencies for the court  
17 and all of the parties.

18 Courts also routinely dismiss without  
19 prejudice when the parties are litigating a case  
20 before another forum, for example, when an  
21 agency is considering an important issue or a  
22 foreign court. The rules are especially salient  
23 in the arbitration context because, as I was  
24 saying earlier, the overwhelming likelihood is  
25 that this case is never coming back to any court

1 and certainly not or potentially not even to  
2 this Court.

3 I'll give you an example. If parties  
4 settle a lawsuit --

5 JUSTICE JACKSON: Counsel, how is that  
6 argument consistent with the language that  
7 Justice Sotomayor puts forward? I mean, I -- I  
8 understand your point about the overwhelming  
9 likelihood is that it's not coming back, but the  
10 statute says "stay until," so at least Congress  
11 thought that it could come back, right?

12 MR. ROSENKRANZ: Congress certainly  
13 thought that there are circumstances in which a  
14 case could come back -- could come back to the  
15 court for sure, but --

16 JUSTICE JACKSON: Right. So doesn't  
17 that undermine your argument that we have to  
18 read this as though the -- you know, with an  
19 understanding that it's never coming back?

20 MR. ROSENKRANZ: No, Your Honor, not  
21 with the understanding that it's never coming  
22 back, but preserving the district court's juris  
23 -- the -- the district court's discretion to  
24 say, look, if you have something that you want  
25 to come back to me with, come back to me, but

1 the answer to your question, Your Honor, is that  
2 "until" still works under our reading because I  
3 was -- as I was saying earlier, "until" simply  
4 indicates how long the litigation has to stop  
5 for and the party can come back to the court  
6 when --

7 JUSTICE JACKSON: Yes, I understand.  
8 Thank you.

9 JUSTICE KAVANAUGH: I thought "until"  
10 goes to the verb "stay"? "Stay until."

11 MR. ROSENKRANZ: Right. And if you  
12 read the word stop -- the -- the word "stay" to  
13 mean "stop," which could entail a dismissal, you  
14 have to stop it until the arbitration is  
15 completed.

16 And at that point, the court no longer  
17 has to stop it, so when it was dismissed without  
18 prejudice, the party can come back to the court  
19 and the stay provision no longer applies.

20 And let me just say one last thing,  
21 which is that this Court should also read  
22 Section 3 in light of the problem that Congress  
23 was trying to solve with Section 3. It was the  
24 problem that too many courts were not honoring  
25 arbitration obligations and were not stopping



1 the litigation when parties violated their  
2 arbitration agreements and brought their claims  
3 in court.

4           There's no reason to believe that  
5 Congress wanted to address that problem by  
6 requiring courts to hold on to lawsuits  
7 unnecessarily, much less by requiring courts to  
8 hold on to them in order to reward plaintiffs  
9 like Petitioners who violated their contractual  
10 obligations to go to arbitration instead of  
11 court.

12           Just to sum up, this Court is not  
13 deciding and we're not asking the Court to  
14 decide what "stay" means in all contexts and for  
15 all time. And I'm -- all I'm saying here is  
16 that context matters.

17           In the context of the Federal  
18 Arbitration Act passed a century ago, Congress  
19 was trying to solve a specific problem that  
20 courts were refusing to stop litigation in  
21 deference to arbitration. Our reading comports  
22 with the leading dictionary definitions and the  
23 cases that routinely dismissed at the time the  
24 common way to stop litigations was through  
25 discontinuance or dismissal and Congress said

1 retain jurisdiction when that's what it meant.

2 All of this supports our position that  
3 "stay" means "stop" under Section 3, but at a  
4 minimum, the alternative reading is not as clear  
5 as my friend on the other side suggests and it's  
6 not enough to overcome both the prevailing  
7 common law practice and the court's inherent  
8 power to dismiss cases with prejudice when  
9 another forum is addressing the dispute and none  
10 of the parties have anything for the court to do  
11 here and now.

12 JUSTICE KAVANAUGH: On your point  
13 about Congress's overall objective, if it's  
14 dismissed rather than stayed, then that opens up  
15 the interlocutory appellate right. Would --  
16 would Congress have wanted that?

17 MR. ROSENKRANZ: So, Your Honor, a --  
18 a couple of things to -- to say about that.

19 First, it is simply not true that the  
20 FAA generally postpones appellate review of  
21 orders to arbitrate until after the arbitration.  
22 I was giving the example of a case that begins  
23 in arbitration and the defendant refuses to  
24 arbitrate. What happens next? There is an  
25 action under Section 4, and that is an action

1 that asks for only one thing, which is to compel  
2 arbitration. When that order is granted, the  
3 case is routinely dismissed and the appeal will  
4 follow. So it is -- it is simply not true that  
5 there is a grand congressional design not to  
6 allow appeals of orders granting arbitration.

7 In any event, this Court has already  
8 rejected Petitioners' argument about the effect  
9 of Section 16(b) in Green Tree. That case  
10 explains that 16(b) is about interlocutory  
11 appeals, which is obviously where Congress was  
12 anticipating that a court would stay but did --  
13 was not saying that the court has to stay. The  
14 court still has the discretion.

15 Nothing in that section bars an appeal  
16 of a final order, which is what a dismissal is.  
17 And the last thing I'd say about that is that I  
18 know one reads a statute as a whole, but we have  
19 to bear in mind that Congress used the phrase  
20 "stay the trial of the action," it wrote it in  
21 1925. Section 16 was passed 60 years later.

22 It is highly unlikely that Congress  
23 intended Section 16 to affect the interpretation  
24 of Section 3. And what -- I would also say that  
25 Congress acknowledged in its Senate summary that

1 it was anticipating that there would be  
2 dismissals followed by appeals. The dismissals  
3 would be final, and that would trigger an  
4 appeal.

5 CHIEF JUSTICE ROBERTS: Thank you,  
6 counsel. Thank you.

7 Rebuttal, Mr. Geysler?

8 REBUTTAL ARGUMENT OF DANIEL L. GEYSER  
9 ON BEHALF OF THE PETITIONERS

10 MR. GEYSER: I'll -- I'll be -- I'll  
11 be brief. My friend says that we're cramming a  
12 lot of meaning into the word "stay." We're just  
13 saying that "stay" means "stay."

14 At the time in 1925, if you look to  
15 Black's Law Dictionary, "stay" was a stay of  
16 proceedings, which is what this is, was defined  
17 as a -- as a temporary suspension of the case.  
18 It's exactly what Section 3 is doing.

19 My friend says there are other  
20 dictionaries that say total discontinuance.  
21 He's referring to the Dictionary of American and  
22 English Law. That's a second diction -- that's  
23 the second definition of "stay." The first  
24 definition was a temporary suspension, again,  
25 exactly what "stay" always means.

1           I think, if this Court tried to stay a  
2 lower court order and the lower court turned  
3 around and dismissed the case, I think the Court  
4 would be fairly surprised. It's just not a  
5 consistent understanding of what "stay" means.

6           Justice Sotomayor is exactly right  
7 that the definition of "stay" meaning suddenly  
8 dismissed is inconsistent with the surrounding  
9 clauses. Justice Jackson is also correct that  
10 it's inconsistent with the proviso at the very  
11 end of Section 3 that shows that Congress itself  
12 contemplated that cases could come back to court  
13 because arbitrations do sometimes fail.  
14 Sometimes parties are in default.

15           My friend pointed to the difference  
16 between Section 4 and Section 3 and said that  
17 you can take an immediate appeal when a Section  
18 4 petition is granted and dismissed. That's  
19 because there's no alternative.

20           What -- when else can you take that  
21 appeal? You'd have to craft an entire new  
22 appellate scheme. When -- when would you take  
23 the appeal from 30 days from what event? Where  
24 would you file the notice of appeal?

25           You know, if there's no longer a court

1 case, I don't know where -- you go to the  
2 district court to file the notice of appeal.  
3 Congress looked at that and said no statute  
4 pursues its purpose at all costs. We can't have  
5 unreviewable district court orders compelling  
6 arbitration, so in that context where there  
7 isn't a preexisting, freestanding suit, we will  
8 allow the immediate appeal.

9 In terms of wasting time, it is  
10 inherently speculative to say some cases are --  
11 are unlikely to come back, some cases are likely  
12 to come back. Will there be a tolling problem?  
13 Will there not be a tolling problem? Those are  
14 exactly the kind of issues that are pointless  
15 for courts and parties to debate.

16 It's much easier to say let's just  
17 stay it. It's exactly correct, as multiple  
18 members of the Court has recognized, you  
19 maintain a list. This Court will maintain cases  
20 that are contemplating settlement on the -- on  
21 its petition stage docket. I don't believe it's  
22 overwhelming the Court to do that.

23 It's not overwhelming district courts,  
24 who can truly say, just let us know whenever the  
25 arbitration is finished. If you do look at the

1 briefing in this case, I think it probably  
2 consumed a good 50 or a hundred, you know,  
3 status worth of time of status reports that we  
4 could have filed instead of having to debate  
5 this at the district court and then debate it on  
6 appeal.

7 Unless the Court has further  
8 questions.

9 CHIEF JUSTICE ROBERTS: Thank you,  
10 counsel.

11 The case is submitted.

12 (Whereupon, at 1:16 p.m., the case was  
13 submitted.)

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